Supreme Court, U.S.
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In The Supreme Court of the United States

NAHQUASEH B. WAUBANASCUM,

Petitioner,

v.

SHAWANO COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the lower court fail to comply with the appropriate standard of review under Fed. R. Civ. P. 50 in vacating a jury verdict and reversing the District Court's denial of the Respondent's motion for judgment as a matter of law?

2. Did the Respondent, which licensed a foster parent with a criminal history involving children, and which later received word of sexual assault allegations against that foster parent, owe a constitutional duty to protect the Petitioner, a child placed in the foster parent's home, from harm at the hands of the foster parent?

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OPINIONS BELOW

The Decision of the Court of Appeals is reported as *Nah[illegible]eh B. Waubanascum v. Shawano County*, 416 F.3d 658 (7th Cir. 2005), and is reproduced in Appendix A. The decisions of the District Court denying Respondent's motion for summary judgment, and Respondent's post-verdict motions for judgment as a matter of law and for a new trial, are unreported, but are reproduced in Appendices B and C, respectively.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals' Decision was entered on August 1, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The text of relevant provisions of Chapter HSS 56 of the Wisconsin Administrative Code (1990) are reproduced in Appendix E.

STATEMENT OF THE CASE

The Petitioner, Nahquaseh B. Waubanascum, seeks review of the Decision of the Seventh Circuit Court of Appeals which vacated the District Court's judgment entered on the jury's verdict in favor of the Petitioner. The District Court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

The Petitioner commenced this action under 42 U.S.C. § 1983. The Petitioner, while a minor foster child, was subjected to a series of sexual assaults over a period of two months by his foster parent, Mark Fry, who had received a foster care license from the Respondent, Shawano County. The Petitioner asserted that he was deprived of his due process rights under the Fourteenth Amendment to the United States Constitution as a result of Shawano County's issuance of a foster care license to Fry, and its subsequent failure to monitor the license after receiving reports of a sexual assault committed by Fry against another minor.

Shawano County moved for Summary Judgment on October 30, 2003, and the motion was denied by the District Court on March 9, 2003. The District Court determined that there were genuine issues of material fact concerning whether the Petitioner had been deprived of his constitutional rights as a result of a policy, practice, or custom of Shawano County. [App. B] The Petitioner's claims against Shawano County were tried to a jury beginning on May 10, 2004. On May 13, 2004, the jury returned a special verdict in favor of the plaintiff and found that Shawano County had applied its policy regarding issuance of foster care licenses at the request of other counties with deliberate indifference to the rights of the Petitioner, and awarded $175,000.00 in compensatory damages, plus costs. The District Court subsequently entered judgment in that amount, plus post-judgment interest

and taxable costs. After denying Shawano County's motion for judgment as a matter of law, the District Court entered an Amended Judgment in favor of the Petitioner, awarding an additional $69,259.50 in costs and attorney's fees, pursuant to 42 U.S.C. § 1988. [App. D]

The evidence presented to the jury established that Mark Fry received a foster care license from Shawano County in August 1995. The Petitioner was subsequently placed as a foster child in Fry's Shawano County home in September 1995.

Before relocating to Shawano County, Wisconsin, Mark Fry resided for more than 10 years in Illinois, where he was employed as high school teacher. In a bizarre incident in 1991, he was arrested and charged with attempted burglary and disorderly conduct when authorities found him on the roof of the home of one of his male students, wearing a "Ninja" outfit (dark clothing and a mask), and carrying a flashlight and a can of mace. [App. F-18 to F-22] This incident was publicized in the Chicago Tribune and local newspapers. [App. F-26] Fry was later convicted of disorderly conduct. [App. F-25 to F-26]

The files of the Northbrook, Illinois Police Department contain additional pertinent documentation concerning Fry, including a statement of another minor who reported observing a figure dressed in dark clothing in his backyard at night on 10 to 15 occasions. [App. F-24] On several occasions, he identified the individual as Mark Fry. [App. F-24] The file also contained a letter from a "Concerned Citizen," in which the author called Fry's actions suspect and "deviant" in nature. [App. F-25] All of this law enforcement information (including a picture of Fry in his "Ninja" outfit) was publicly available before Shawano County issued the license to Fry in August 1995. [App. F-22 to F-23, F-25]

In or about July 1995, Fry applied for a foster care license through Menominee County. However, because Fry resided in Shawano County, by law only Shawano County could issue him a foster care license. Shawano County issued the foster care license to Fry, at the request of Menominee County. Shawano County was thus the "licensing agency" in this case. [App. F-3]

According to (then) Chapter HSS 56 of the Wisconsin Administrative Code, a prospective foster care license applicant was required to provide authorization to the licensing agency to perform a criminal background check with the Wisconsin Department of Justice, local, and federal law enforcement agencies. [HSS 56.03(4)(a)(2), 56.04(4m)(a); App. E-4 to E-5, E-8; F-3] An applicant was unqualified to hold a license if he or she had been convicted of a felony or misdemeanor and if the circumstances of the conviction related substantially to the care of children. [HSS 56.04(4m)(b)(1); App. E-8] The code further required that the applicant submit his or her employment history to the licensing agency. [HSS 56.03(4)(a)(8); App. E-5]

When receiving a request from another county to license one of its own residents, Shawano County's established practice was to rely solely on the requesting county to conduct all necessary and appropriate background checks and the investigation of the prospective foster parent required of the licensing agency under Wisconsin law. [App. F-8, F-12] On occasion, Shawano County would issue foster care licenses when the criminal background check had not yet been completed. [App. F-42 to F-45]

A Menominee County employee spoke with two of the three references Fry had listed on his application. [App. F-37] The employee could not recall whether or not she had spoken to Fry's employer or to any of his previous

employers. [App. F-38] Menominee County submitted the criminal background check authorization received from Fry to the Wisconsin Department of Justice, whose inquiry did not include a check for criminal convictions in states other than Wisconsin, including Illinois, where Fry had previously resided.

Ronald Stuber, the Director of the Shawano County Department of Social Services, signed the foster care license granted to Mark Fry, with an effective date of August 21, 1995. [App. F-8; Ex. 1005] Stuber was the official responsible for determining whether Shawano County would issue a foster care license to a prospective applicant, and had final authority over that decision. [App. F-7] The only document reviewed by Stuber prior to issuing the foster care license to Fry was a copy of the two-page home study report completed by Menominee County. [App. F-4, F-10] Consistent with its policy, Shawano County issued the license to Fry without conducting the licensing requirements set forth in HSS 56 of the Wisconsin Administrative Code. [App. F-8 to F-10][1] Shawano County did not receive any criminal background check authorization f m Fry. [App. F-9] Shawano County did not obtain any criminal or employment history from Fry. [App. F-3, F-5 to F-6, F-9, F-10] Shawano County did not contact any of the schools where Fry had been employed. [App. F-5 to F-6] Shawano County did not make any effort to verify that Menominee County had complied with the licensing requirements. [App. F-13 to F-14] Shawano County did not take any action to monitor the license after it had been issued, or to ascertain

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[1] When asked to identify the provision in HSS 56 wh permitted the licensing agency to delegate its responsibilities u. r the code, Richard Kane, the Deputy Director of the Shawano C nty Department of Social Services, was unable to do so. [App. F-7]